

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
TESTING TECHNOLOGIES, INC., and  
MG PREP, INC.,

Plaintiffs,

-against-

DECLARATION

MO MEDIA, LLC., PAUL OWENS and  
JOHN DOES, 1-10,

07 CIV 7360

Defendants.  
-----X

Sean Selinger, being duly sworn, declares the following:

1. I am the owner of the plaintiff, Testing Technologies, Inc and I make this declaration in opposition to the motion of defendant Mo Media, LLC's ("Mo Media") to dismiss for improper venue or, alternatively, to transfer venue.

2. Plaintiffs Testing Technologies, Inc. ("Testing Technologies") and MG Prep, Inc. ("MG Prep") (collectively "Plaintiffs") brought this action against Mo Media, Paul Owens, and John Does 1-10, alleging violations of the Lanham Act 15 U.S.C. § 1125(a), New York General Business Law §349 and 350-a, common law unfair competition, common law fraud, and misrepresentation.

3. Testing Technologies was founded in 1999. It is an internet test preparation company which electronically delivers test preparation products for persons intending to take the Graduate Management Admissions Test (GMAT), Graduate Record Examination (GRE) and the Law School Admissions Test (LSAT). Its customers range from individuals to schools and colleges and other test preparation companies. Most of Testing Technologies'

customers are obtained via internet search engines, including Google. Testing believes New York City yields more customers than any other city in the United States.

4. MG Prep is also an internet test preparation company. It offers classroom, prep guides and online preparation courses for the GMAT.

5. Mo Media is a competing internet test preparation company. It is co-owned by defendant Paul Owens.

### **Defendants' Tortious Conduct**

6. Mo Media and Owens have engaged in three forms of tortious conduct against Testing Technologies and MG Prep: false and deceptive claims, deceptive proxy sites and tortious interference.

#### ***False and Deceptive Claims***

7. In 2001, Mo Media began displaying websites that posted glaringly false and inaccurate information, made numerous claims that other test preparation companies (not listed by name) could not deliver the results that Mo Media could deliver, and disparaged competitor's products, including the products of Testing Technologies and MG Prep. Mo Media's websites were riddled with false claims regarding their products, such as being the "only study guide written by written by ACTUAL Graduate Management Admissions Test experts". Mo Media has responded to the instant lawsuit by comprehensively rewriting its sites and removing most of the offending language, thus tacitly acknowledging the deceptive nature of its advertisements.

#### ***Deceptive Proxy Sites***

8. Mo Media employs several brazenly deceptive nonprofit proxy promotional

January, in the GMAT and GRE, they are the top two for-profit results (the second one is an affiliate). For the “SAT” term, they are two of the first four (TestPrepReview and StudyGuideZone). Most of these sites drive internet traffic to Mo Media and the net result is that Mo Media and their proxies (according to compete.com) get more than double the traffic of Kaplan.com <http://siteanalytics.compete.com/testprepreview.com+mo-media.com+kaplan.com/?metric=uv> Given a standard conversion rate of 1.5%,<http://www.searchmarketingstandard.com/blog/2007/07/what-is-the-average-conversion-rate.html>, I estimate that as a result of this fraud, Mo Media derives over a hundred thousand dollars a year and possibly more than ten times that. Another result of this fraudulent practice is the reduction in traffic, and hence revenue, to both Testing Technologies and MG Prep.

10. The evidence linking Mo Media to these fake nonprofit promotional proxies is overwhelming. TestPrepReview.com, which Owens has admitted he promoted to schools and libraries, claimed to be a nonprofit while the Texas Secretary of State listed Owens as the owner of Mo Media. Sue Brissette told me that Mo Media also spammed schools nationwide promoting ScholarShipHelp.org as a project of Sue Brissette, when it was in fact run by Mo Media. Sue Brissette lives in Albany, NY and is expected to be a witness for the Plaintiffs regarding Mo Media operations. They employ another apparent fake nonprofit promotional (StudyGuideZone.com) that claimed to be run by Minnesota Educators given “generous grant from the McNamara Educational Trust”. Over a dozen other sites appeared to be run by nonexistent organizations or individuals while linked to Mo Media servers, IP addresses and intellectual property.

### *Tortious Interference*

11. When Testing Technologies confronted Mo Media with this overwhelming adverse evidence, Mo Media turned to a campaign of tortious interference and intimidation against Testing Technologies which, in the process, is also harming MG Prep. Because of Mo Media's fraudulently elevated status with Google, it has been able to link to sites that were beneath Testing Technologies in order to boost those sites above Testing Technologies. In addition, we have reason to believe that Mo Media then conveyed misleading information to schools and companies linked to Testing Technologies in order to further lower Testing Technologies' search engine ranking.

12. In addition to lowering the positioning of Testing Technologies websites, Mo Media has used a strategy of "Google Bombing" to promote target sites just below Testing Technologies sites. Given the awesome power wielded by Mo Media sites in the search engines, with their 20,000+ links, they targeted this "pagerank juice" to leapfrog sites above those that link to Testing Technologies and promote MG Prep in the search engines. Specifically, Mo Media targeted their affiliate site English-Test.net to leapfrog Testing Technologies. Indeed, Mo Media depressed Testing Technologies and now has the top two for-profit listings on the term "GMAT" and "GRE" (the second an affiliate) as of mid-January, resulting in less traffic that could be driven to MG Prep.

13. In 2008, we believe Mo Media's use of search engine manipulation through google bombing and conning entities to delink to Testing Technologies has successfully knocked Testing Technologies' main website off the front page/first ten listing in Google for the first time since in 1999.

### **The Southern District of New York is the Proper Venue**

14. Venue is proper in the Southern District of New York for all of the above three forms of tortious conduct and the interests of justice and convenience of the parties require that this case remain in this Court. New York is the epicenter of the test prep industry where the companies harmed by Mo Media are based, specifically the GMAT prep industry, which constitutes the bulk of Testing Tech revenues. Three of the largest four GMAT prep companies are in New York City. Mo Media's non-proxy sites have specifically targeted New York state residents with the same false claims that form the basis of this lawsuit and their link solicitation spam emails have targeted New York schools and institutions.

15. There are only a few dominant internet, classroom and book test preparation companies in the United States; many of them are based in New York City. Indeed, New York City is the *de facto* capital of the standardized test prep industry with Kaplan, Princeton Review, Manhattan GMAT (MG Prep) and McGraw Hill. Thus, the central locus of test prep companies damaged by Mo Media's false claims and proxy sites is the Southern District of New York.

16. The number of schools and universities within the Southern District of New York that have been targeted by Mo Media's false proxy promotional campaign is perhaps the largest of any District in the United States. Also, many SUNY schools link to Mo Media proxies.

17. The actions of Mo Media's corporate (non-proxy) sites also directly target New York residents. Defendants state in their motion that, "[w]hile Mo Media does produce test preparation materials for two New York specific tests, these test preparation materials are

not the subject of this suit.” But many of the suspected false claims made by Mo Media that are the subject of this lawsuit (and that were taken down by Mo Media once this suit was filed) are repeated verbatim on the sites specifically targeting New York students, such as their Regents Exam Secrets site (<http://jkn.com/View?j=835302.131999569514>):

*We maintain a full time research staff, all of whom are nationally recognized experts on standardized testing*

*Our guide is the only product on the market that addresses the difference between merely knowing the material and knowing how to use the material to perform on test day.*

*When I created this product, I wanted it be effective, easy-to-use, and affordable for everyone who needed my help. With current customer satisfaction rates hovering near 96%, I am very pleased with the results of our efforts- and I'd like to extend the same offer to you.*

These same apparently deceptive claims are made on the websites that form the basis of this lawsuit.

18. By the year 2004, an internet user in the Southern District of New York could log onto Mo Media's websites and buy Mo Media's products directly. Mo Media admits that it had customers in the Southern District and that it promoted itself to schools and colleges, many of which we believe were in the Southern District. Many of these schools and colleges received information indicating that Mo Media was a not-for-profit entity and, in turn, provided links to Mo Media's fake promotional websites. These links from schools and colleges are exceptionally valuable for the granting of a high ranking by Google algorithm. An internet user browsing for certain standardized test preparations on Google encounters highlighted and targeted links, the highest ranked links, to Mo Media's proxy websites. Currently, Mo Media is number 1 and number 4 among for-profit companies listed under the term "SAT" in Google. On GMAT and GRE, Mo Media and its affiliate site [English-

test.net] are number 1 and number 2 among for-profits (as of mid-January). Mo Media proxies are in the top five in Google results among test preparation companies for dozens of test terms.

19. Mo Media correctly states in its motion papers that “If Mo Media had directed its marketing against a Plaintiff in the Southern District of New York, venue might lie in the Southern District of New York.” Mo Media has targeted MG Prep, which is located in New York City, by sabotaging the pagerank of Testing Technologies sites that link to MG Prep and google-bombing the sites below it.

20. Mo Media erroneously states that “[i]f trial were held in New York, Mo Media would have no legal means to compel [its witnesses’] testimony.” This is not true because among the witnesses in Texas that are set forth Mo Media’s motion papers are many family members or current/past employees and Mo Media easily has the financial wherewithal to accommodate their attendance in New York. Through its network of promotional proxies, Mo Media gets more traffic than Kaplan.com (based on data from compete.com) and should therefore have revenues well in excess of \$1-2 million per year. Testing Technologies is a comparatively smaller company with approximately \$500,000 in revenues and high expenditures. Furthermore, Mo Media former employees and family members are not objective third-party witnesses and their testimony will have minimal probative value.

21. While I have identified many potentials schools linking to Mo Media proxies in the Southern District of New York, I have found very few in the Eastern District of Texas. The Eastern District of Texas is predominately rural, geographically isolated and has a much lower concentration of colleges and universities. It contains neither Dallas nor Houston, but



simply a few small cities such as Beaumont, Plano, Tyler and Texarkana. The Southern District of New York has a population well over ten times the estimated population of the Eastern District of Texas.

22. The ratio of schools and higher educational institutions is even more sharply skewed in favor of the Southern District, as many have links to Mo Media proxies including Fordham, Westchester County Community College and Rockland County Community College.

23. Many of the objective, non-party witnesses are based in New York. A number of plaintiffs' key witnesses are in New York State:

a) Sue Brissette, who worked for Mo Media only to have her name used without permission for the promotion of a website spammed to schools nationwide (and the schools emailed her).

b) One Mo Media proxy claimed to be run by a "Jack Anderson" who "taught at Columbia University".

c) The "Avner Foundation", an organization used on another Mo Media website was run by a "Levi Bryn" claiming an address in New York City.

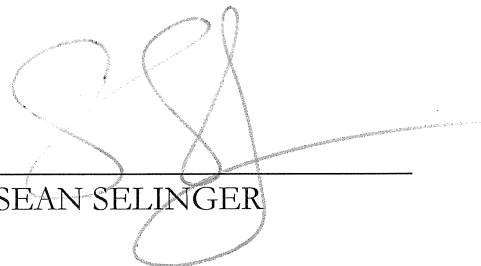
d) Google, a key witness, has two offices in New York City and none in the Eastern District of Texas. Google's second largest office is in Chelsea and employs an estimated 500 employees. This is not simply a sales office, like the one in Dallas, but constitutes a programming and technical center with researchers familiar with the pagerank algorithm. Google has pertinent information relating to Mo Media's advertising and exploitation of its search results.



e) One of TestPrepReview's principle advertisers, NextStudent, has offices in Rochester, NY.

f) Kaplan, McGraw Hill and Princeton Review may be called as witnesses to counter the statements made on Mo Media sites that they are the only company that "teaches the test" and "Our GMAT Secrets study guide is written by ACTUAL Graduate Management Admissions Test experts". Also, these companies, along with Barrons Education Series (Suffolk County), have suffered from Mo Media's alleged unfair competition relating to link solicitation, false statements and can testify about the value of search engine traffic and the harm that Mo Media has done to their businesses.

g) Schools located in the Southern District that may be called as witness because they were targeted by MoMedia and/or they posted links to Mo Media's suspected proxy pages include Fordham University, Westchester County Community College, Rockland County Community College, Orange County Community College, City University of New York, New York Medical College, Monticello High School, Carmel High School, and Washingtonville High School.



SEAN SELINGER